

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0390, Appeal of Michael P. Robarge, the court on March 31, 2006, issued the following order:

The claimant, Michael Robarge, appeals a decision of the department of employment security appeal tribunal (tribunal), affirmed by the appellate board, finding that he had been discharged for dishonesty connected with his employment and had been overpaid \$4,836 in unemployment benefits. We affirm.

In reviewing a decision of the tribunal we are confined to the record and will not substitute our judgment for its judgment as to the weight of the evidence on questions of fact. Appeal of Riendeau, 152 N.H. 396, 398 (2005). We will uphold the decision of the tribunal unless its findings or conclusions are unauthorized, affected by an error of law, or clearly erroneous in view of all the evidence presented. Id.; see RSA 282-A:67 (1999). The tribunal must apply a preponderance of the evidence standard when assessing the evidence before it. Appeal of Lakeview NeuroRehabilitation Ctr., 152 N.H. 205, 210 (2003); see also Petition of Preisendorfer, 143 N.H. 50, 54 (1998) (proof by preponderance means evidence taken as a whole shows that fact to be proven is more probable than not).

The tribunal found that the claimant had been discharged from his employment at a retail computer store for stealing \$500. It is undisputed that a \$500 cash sale was made on Friday and that the theft was first discovered on the following Monday. The claimant argues that because the evidence of theft was purely circumstantial and four employees had access to the store and its computer system, there was no preponderance of evidence to implicate any of the four individuals.

The tribunal had the opportunity to hear testimony from the four employees and to assess their credibility. Cf. State v. Giles, 140 N.H. 714, 718-19 (1996) (this court defers to jury findings on credibility because transcript provides no indication of witness's tone of voice or demeanor, two useful tools in assessment of credibility). Two of the employees were the owner and his mother, who served as his part-time bookkeeper. The tribunal found it improbable that the owner would steal from himself and that his mother came to the store infrequently and was not advised of the sale until after the theft. In excluding the third employee, a part-time clerk, the tribunal noted that both the owner and the claimant had testified about his honesty. The tribunal also found that the third employee had reported the sale to the owner's mother and that, had he not done

so, the theft would not have been discovered. The tribunal found that the claimant was in the vicinity on Sunday, the day of the theft, and that his witness provided only limited testimony as to his whereabouts that day. That the other three employees had access to the building did not prevent the tribunal from concluding in this case that it was reasonably probable that the claimant was responsible for the theft. See Hancock v. R.A. Earnhardt Textile Mach. Div., 139 N.H. 356, 360 (1995) (circumstantial evidence necessary to permit finding based on preponderance of evidence standard must make finding reasonably probable, not merely possible). Because the record supports the tribunal's findings, we uphold its conclusion that the claimant was discharged for dishonesty connected with his employment and that he was thus ineligible for unemployment compensation. See RSA 282-A:35 (1999).

Given our conclusion, we need not consider the claimant's remaining arguments concerning the tribunal's findings of a second incident of dishonesty.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**